

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 411
3217219

BETWEEN CUSHLA HURRELL
Applicant

AND MENOPAWS LIMITED
T/A NUMBER 8 CAFÉ
Respondent

Member of Authority: Helen Doyle

Representatives: Paul Mathews advocate for the Applicant
Paul Brown counsel for the Respondent

Investigation Meeting: 26 April 2024 in Christchurch

Submissions Received: 17 May 2024 from the Applicant
16 May 2024 from the Respondent

Determination: 10 July 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Cushla Hurrell was employed by a café owned and operated by Menopaws Limited (Menopaws) in Cheviot, North Canterbury. She was initially employed in a part time front-of-house role from October 2020. After expressing some interest in becoming a chef Ms Hurrell worked part time back-of-house whilst undertaking a culinary course.

[2] The sole director of Menopaws is Kirsten Wylie. Ms Wylie has her own business in Christchurch but had been approached by members of the Cheviot community to purchase a

local café to support the local community and provide jobs as both local cafés had closed post-Covid lockdown. As Ms Wylie owns a business in Christchurch, she employed a manager who I shall call E to manage the café business in Cheviot.

[3] Ms Hurrell has two employment relationship problems. The first is that she was unjustifiably disadvantaged in her employment after she was abused by another employee on 26 August 2022. Ms Hurrell alleges that there was a failure to investigate her concerns and that she was advised that, if she did not return to work, it would be considered that she had abandoned her employment. Ms Hurrell says that there was a failure to provide her with a safe workplace.

[4] Ms Hurrell then resigned from her employment on 15 September 2022 and says her resignation was in the nature of a constructive dismissal. She seeks reimbursement of lost wages in the sum of \$3,777.60 gross and compensation in the sum of \$38,000 for the constructive dismissal and the unjustified disadvantage together with costs. Costs are also sought.

[5] Menopaws does not accept that it failed to investigate Ms Hurrell's concerns. Ms Wylie says that there was an investigation carried out after the concerns were raised, but Ms Hurrell refused to engage in the process. It does not accept that it failed to provide a safe working environment and says that instead of choosing to resolve matters Ms Hurrell resigned.

The investigation meeting

[6] A statement of problem was lodged on 4 March 2023. An investigation meeting date was scheduled by the Authority for 4 October 2023, however, was adjourned as Mr Mathews was unavailable. The Authority rescheduled an investigation meeting for 26 April 2024 in Christchurch.

[7] The Authority heard evidence from Ms Hurrell and her partner, Andrew, and from Ms Wylie.

[8] After commencing the investigation meeting it became apparent that the Authority may not have all the relevant documentation. An adjournment was taken for about an hour and a quarter, to enable the documentation to be provided and considered by the parties before resuming the meeting. The break was treated as an early lunch adjournment and the meeting recommenced at midday.

[9] Submissions were timetabled at the end of the evidence, at the request of the representatives because there was further documentation to be provided and there was to be an attempt to retrieve audio to accompany camera footage.

The issues

[10] The Authority needs to consider the following issues in this matter:

- (a) The legal framework for a constructive dismissal
- (b) What were the reasons for Ms Hurrell's resignation?
- (c) Was the resignation caused by breaches of duty on the part of Menopaws?
- (d) If there was a constructive dismissal, then was it unjustified?
- (e) Alternatively, or additionally were there unjustified actions that caused disadvantage?
- (f) If a grievance is established, what remedies are payable and are there issues of contribution and mitigation?

Legal framework for a constructive dismissal

[11] In some circumstances a resignation may amount to a dismissal. Judge Williamson stated in the Court of Appeal judgment in *Wellington Clerical Union v Greenwich*:¹

There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

[12] The Court of Appeal listed three non-exhaustive situations where a constructive dismissal might occur.²

- a) Where the employee is given a choice of resignation or dismissal;
- b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- c) Where a breach of duty by the employer leads a worker to resign.

[13] Mr Mathews submits that there was a breach of the obligation to provide Ms Hurrell with a safe workplace free of abuse.

[14] Where breaches are alleged the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* has held the correct approach is to firstly conclude whether the resignation was caused by a breach of duty on the part of the employer. The Authority needs to assess whether the breach of duty, if one found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.³

[15] Ms Hurrell has the burden of establishing that the resignation was actually a dismissal.

What were the reasons for the resignation?

Unjustified disadvantage grievance raised

[16] An unjustified disadvantage grievance was raised by Mr Mathews in a letter dated 29 August 2022 about the incident on 26 August 2022. It referred to the disadvantage as being the failure to provide a workplace “free of abuse” making the workplace unsafe. Paid leave was requested but not agreed to. It was stated that if the matter was not resolved urgently Ms Hurrell may have no choice but to resign. Compensation, lost wages, an investigation into the incident and costs were sought. Mediation was agreed to by Menopaws.

² *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

Resignation contained in an email dated 15 September 2022

[17] An email from Mr Mathews was sent to Mr Brown on 15 September 2022 in which he advised Ms Hurrell had no choice but to resign immediately and a constructive dismissal grievance was raised. The reasons for the resignation were set out. They were that Ms Hurrell had been abused more than once and that the incident on 26 August had been characterised as a “disagreement between adults.” Mr Mathews wrote that based on that it was clear that Ms Wylie did not intend to do anything about the behaviour, and it was inevitable that it would continue. He also noted from previous exchanges that Ms Wylie had come to conclusions about Ms Hurrell without putting those to her.

[18] He wrote that Ms Hurrell had been threatened with abandonment and had learnt of other instances of staff being abused. The work environment was referred to as toxic and it was alleged that Ms Wylie was not taking it seriously and that she preferred the view that Ms Hurrell and other staff were to blame.

[19] I accept that those were the reasons for the resignation. Additionally, there was some focus in the evidence on the taking of six days to supply the camera footage. The reason for resignation is in essence the same as the unjustified disadvantage claim.

Was the resignation caused by breaches of duty on the part of Menopaws?

[20] The employment relationship between Ms Hurrell and Menopaws was reasonably successful. Ms Hurrell said minor disagreements with staff were normally sorted out successfully. She was supported by Menopaws to undertake the part-time culinary course and provided with new hours to suit her partner’s work and the requirements of her three young children.

[21] The matters that require examination are those that followed the appointment of a new chef, who I shall refer to as X. X started at the café on 25 July 2022 although his first day in the kitchen was not until 27 July 2022. It is necessary to set out the events after that date for context to what occurred and followed 26 August 2022.

[22] It was common ground that X started in an “overly enthusiastic way” and contributed significantly to the Facebook group chat. This was not positively received by the other staff including Ms Hurrell. Ms Wylie said that the staff were a close-knit group and X was seen as a newcomer. Negative views were formed quickly about him. When some of the messages from the group chat are considered, it is clear that Ms Hurrell and likely others were concerned and resistant to a comparative newcomer suggesting different ways of working and providing food and how he expressed himself.

First resignation

[23] On 3 August 2022, Ms Hurrell advised Ms Wylie and E by email, that she would be leaving Number 8 café with two weeks’ notice and her last day would be 17 August 2022.

[24] The reason for her resignation was:

Due to the change in staff and the new treatment received from this member, I no longer feel number 8 is a place I will enjoy working and will affect my mental health. I will not be spoken to the way I have been in the last week it is unacceptable behaviour from somebody who is meant to be a leader/supervisor. The comments he has made/messages on Facebook. Have been very unprofessional from a senior staff member.

[25] Ms Hurrell asked that during her two-week notice period she not be rostered on with X.

[26] The evidence supported Ms Hurrell had worked about two days with X before she gave notice.

X and social media

[27] At a point in time, likely before 3 August 2022, some information about X was discovered on social media and discussed with other staff. Ms Hurrell denied being the one who found an article about X and disseminated it to staff. She said it was the other chef who sent it to E and then it was forwarded to Ms Wylie. Ms Wylie was already aware that there had been an incident about ten years prior involving X but was prepared to give him a chance. At the point she offered X the role Ms Wylie said New Zealand had a shortage of about 30,000

chefs and without a chef the café could no longer operate and would have to close meaning everyone would lose their jobs.

Ms Wylie responds to the giving of notice

[28] Ms Wylie responded to Ms Hurrell's email on 3 August 2022. She said she was sorry that Ms Hurrell had taken that step and was not prepared to give the situation time to settle and her time to find alternatives. Ms Wylie set out that she did not have many options with chefs. The other chef had resigned leaving only X who had been at that point there less than a week. Ms Wylie wrote that X had not been on the group chat since the previous night as he had been removed from the page. Ms Wylie advised she would attempt to meet Ms Hurrell's request about the rostering.

Resignation may be prevented if X changes

[29] Ms Hurrell then responded to Ms Wylie on 3 August and advised that if X changes she was happy to stay on but would still give notice if there is no change. It was clear from her response that her leaving was not about Ms Wylie but it was about working with X.

Steps Ms Wylie took after 3 August 2022

Having a meeting with X

[30] There was an incident on 4 August 2023 that did not directly involve Ms Hurrell. An argument escalated between a kitchen hand and X. Ms Wylie said that there was a misguided sense that X was to blame for the other chef resigning and being on garden leave. X was called to a meeting in Christchurch with Ms Wylie about his conduct and the incident.

[31] Ms Wylie said that X was stressed because the team had left him alone to cope with a new menu, ordering with no lists or supplier knowledge and busy service. She felt he had been the subject of harassment and bullying by staff. Ms Wylie had some awareness of issues with X that I do not need to set out here that likely contributed to his difficulties with emotional regulation.

Meeting to try to resolve conflict in the workplace 10 August 2022

[32] A staff meeting was organised for 4pm Wednesday 10 August 2022 to discuss the conflict in the workplace. Ms Hurrell was invited to attend the meeting. Ms Wylie stated in an email dated 7 August 2022 to Ms Hurrell that she would attempt to get to Cheviot for 3pm so that she could have a catch up with Ms Hurrell and then if need be a meeting with X and Ms Wylie separately afterwards. Ms Wylie also said that X was not working in the kitchen on the Tuesday so Ms Hurrell could work some hours.

[33] Ms Hurrell was unable to attend the meeting because of childcare issues. The evidence and various forms of messaging supported a telephone discussion between Ms Wylie and Ms Hurrell took place before the meeting on 10 August 2024.

[34] Ms Wylie said the staff meeting explored ways to cope with stress and conflict at work including taking time out to cool down if there was an event that could lead to conflict. There was also discussion about treating each other with respect and dignity. Ms Wylie considered X's behaviour improved for a time after the meeting.

Resignation is withdrawn

[35] For a variety of reasons a face to face meeting did not take place between Ms Wylie and Ms Hurrell before the end of the notice period on 17 August 2022. It is likely that there was a discussion by telephone on 18 August that Ms Wylie said touched on ways to avoid conflict and diffuse the situation. Walking away when things got heated was likely discussed. Ms Hurrell said that an important matter for her was that X had been directed that any changes had to go through Ms Wylie.

[36] Ms Hurrell withdrew her resignation on 18 August 2022 by email on 18 August 2022 and returned back to her usual shifts.

What happened then?

[37] Ms Hurrell refers to further matters of concern between her returning to work and resuming working with X. I will set out what occurred on the three other shifts before the issue

on 26 August 2022. I am however satisfied the only issue brought to the attention of Ms Wylie was the issue on 26 August 2022.

[38] Between the withdrawal of the resignation on 18 August 2022 and the incident on 26 August 2022, Ms Hurrell worked three days with X. She left within a short time of commencing her shift on 26 August 2022.

19 August 2022

[39] Ms Hurrell was working this day. Ms Wylie had arranged a drug bus for testing staff that day because she said that there were a lot of rumours going around about X being under the influence. Ms Hurrell confirmed in her written evidence that staff had discussions between each other that X was “high” and on comedowns and that worried them. Ms Hurrell said that on 19 August X walked around laughing saying he knew the bus was coming and that Ms Wylie “knows he smokes weed before work.” Ms Hurrell thought that he took harder drugs. There was no evidence provided to the Authority that testing resulted in a positive test for X.

[40] Ms Hurrell said that on the drug testing day X told another employee to “just f--k off.” The employee left to cool down and returned to work. Ms Hurrell was not involved in that incident but heard X say that he indicated he did not care with Ms Wylie said and that it was his “f---g kitchen.” Ms Hurrell said that she began to regret coming back.

24 August 2022

[41] Ms Hurrell was the sole cook on this day. She received a call early afternoon that her child was sick and she had to pick him up. She messaged X that night to let him know and apologised for not completing her tasks. X was supportive in his responses.

25 August 2022

[42] Ms Hurrell said that as soon as she got into the café she was given a heads up from other staff to “watch out X is not in a good mood”. She said that X started “going off about things not done” but she told him it was out of her control because her son was unwell. Ms Hurrell said that she received an “attitude” from X for the rest of the day but she kept her cool.

Incident and last day in the workplace 26 August 2022

[43] Ms Wylie said that the incident on this day was caught on cameras in the café and there was available audio. The audio aspect was not able to be retrieved. The Authority has viewed camera footage of the exchanges only. Having heard the evidence there were different views about context but the main dispute was what was said to Ms Hurrell as she left the cafe.

[44] On 26 August 2022 Ms Hurrell arrived early to have a chat with E about rosters. E told Ms Hurrell that X had abused her that morning and that Ms Hurrell would need to watch herself.

[45] About 20 minutes after the shift had started X was stressed about whether there were mushrooms. He concluded that there were no mushrooms at the café and left at pace to purchase some mushrooms from the shop.

[46] Whilst X was at the store Ms Hurrell asked another employee who I shall call M whether they had mushrooms. M responded, "I'm sure we do." Ms Hurrell then went upstairs and discovered that there were some cooked mushrooms sitting in the chiller behind a container of tomatoes. She then went back downstairs to the big chiller and M showed her two whole boxes of mushrooms.

[47] X returned from the store with the mushrooms Ms Hurrell pointed out to him that the café already had mushrooms.

[48] X reacted badly to this and told Ms Hurrell that she "f-----g set him up" and "we are all c---s" trying to set him up. He said Mrs Hurrell had hidden the mushrooms and then pulled them out when he left.

[49] Ms Hurrell said that she responded that X clearly "just didn't look good enough".

[50] X continued to talk about the mushrooms and related concerns about being set up so Ms Hurrell said, 'f--k this I'm out' and went outside to cool off. As Ms Hurrell was walking off, X followed her.

[51] What he said to her before she left the workplace for good is disputed. Ms Wylie accepts that X likely swore and told Ms Hurrell to “f---k off.” She did not conclude from the audio footage that X additionally said the words Ms Hurrell said in her evidence he did “don’t come back.”

[52] In a text message Ms Hurrell sent to Ms Wylie at 10.13 am which would have been very soon after the exchange she wrote the following:

I have just left work I’m not going to be spoken to like that and be told I am setting him up because he can’t look probably (sic) in a fridge then to be told to f--k off!

[53] There is agreement that the words “f--k off” were likely used by X to Ms Hurrell. If the words and “don’t come back” were used I am satisfied that X did not have authority to exclude someone from the workplace. Those responsibilities sat with E and she in turn was answerable to Ms Wylie.

[54] Ms Hurrell left the café on 26 August 2022 and immediately telephoned Ms Wylie. Ms Wylie was in the middle of a consultation and activated a text message that she would call Ms Hurrell back. Ms Hurrell then phoned back and after receiving another text message from Ms Wylie that she would return the call sent the text set out above.

[55] Ms Wylie then called Ms Hurrell back and they talked about what had occurred for a few minutes. There is no dispute that Ms Wylie said that she would talk to X and other staff to piece together what had occurred and get back to her. Ms Wylie was not able to talk to anyone until after the lunch service.

[56] There was the commencement of an investigation into the events that day involving Ms Hurrell and X. Ms Wylie held discussions with E, X and M. She needed to talk to Ms Hurrell for a full picture of the incident. Ms Wylie tried to call Ms Hurrell back. Ms Hurrell said that she was in the shower and she listened to a voice message left from Ms Wylie.

[57] Ms Hurrell said that the voice message from Ms Wylie was the last straw. Ms Hurrell said that Ms Wylie left a message saying that she needed to “stop running away when things get heated”. Ms Wylie said the message left by her from what she could recall was more about

walking away from conflict and taking time out. There was likely some mention that she could not just walk away from her job.

[58] Ms Wylie continued to attempt to contact Ms Hurrell over the weekend without success by phone and Facebook message to talk about the incident.

[59] Mr Mathews submits that any investigation was clouded by a view that Ms Hurrell was a ringleader. Ms Wylie's use of the word "ringleader" in an email to Mr Brown that he subsequently sent to Mr Mathews appeared in the main to refer to Ms Hurrell searching social media articles about X and disseminating them. Ms Hurrell denies that she did this.

[60] The conduct on X's part was inappropriate when he told Ms Hurrell to "f--k off." The evidence supported colourful language per se was not unusual between staff at the café. Ms Hurrell for example on the day of the exchange in a Facebook message to E referred to X as a "r---d c--t". Ms Hurrell drew a distinction with using such language and using it aggressively. I accept there is a difference.

Was there any investigation into the alleged unsafe workplace resulting from the incident on 26 August 2022?

[61] Ms Wylie engaged with X about what had occurred on 26 August 2022. Ms Wylie looked at the camera footage and listened to the audio.

[62] Mr Mathews concluded there was no disciplinary action taken. Ms Wylie said in evidence that the disciplinary outcome was confidential between her and X. Ms Wylie did not conclude from the camera footage that it was inconsistent with X believing he had been set up. Objectively, X could have genuinely believed he was set up about the mushrooms even in the absence of any intention to do that by Ms Hurrell or other staff and reacted inappropriately. That would have impacted any outcome about his behaviour. X did end up leaving the café in late September 2022.

[63] Mr Mathews submits that the abuse on 26 August 2022 made the workplace unsafe and it was not the first occasion. I could not be satisfied that the first resignation was due to Ms

Hurrell being sworn at in the same way as on 26 August. It seems from the resignation letter to relate more to unprofessional group chat messages. Ms Hurrell had observed X be abusive to other staff.

[64] Ms Wylie said that she held many impromptu and formal meetings with X about performance and the way he interacted with staff. She provided him with some tools to regulate his emotional outbursts. There was a staff meeting on 10 August 2022. Ms Wylie was also concerned that X was the subject of harassment and bullying from staff because he had been the subject of rumours about his background, there had been talk behind his back and staff were silent when he walked in the room. It was not a straightforward situation for an employer to deal with.

[65] After the incident Ms Hurrell instructed Mr Mathews. Menopaws through Mr Brown fully responded to the concerns and I do not conclude as Ms Hurrell did when making a decision to resign that nothing was to be done about the behaviour. Mr Brown in his letter dated 30 August 2022 wrote:

8. As Cushla has not been dismissed, please confirm whether she wishes to resign her employment or not. If she does not resign then Kirsten will address the relationship and behaviours between Cushla and X. If Cushla does not want to resolve any issues with X then she is free to resign.

[66] Menopaws had a duty to investigate Ms Hurrell's concern about what X said to her. I do not conclude from an objective analysis of all the material provided there was a failure to undertake any investigation of the incident.

[67] Menopaws is not required to guarantee that there will be no further instances of inappropriate conduct between X and Ms Hurrell. Rather it is required to take all practicable steps to avoid exposing Ms Hurrell to further risk to her psychological wellbeing. Practicable steps were taken as set out above. They were short of dismissal of X however it is clear that aspects of his behaviour had been discussed with Ms Wylie, he had been told some of his behaviour was unacceptable, he had been removed from the group chat and he was provided with tools to try to change the way he reacted. The wider staff group had also been involved in trying to have constructive relationships. There had been drug testing. There was an offer to

look at the matter further and address the relationship and behaviours if Ms Hurrell remained in employment on 30 August 2022. There was an onsite manager. The company agreed to go to mediation in correspondence from Mr Brown dated 30 August and 8 September. There was, likely from the evidence, some disciplinary outcomes for X and ultimately these resulted in the employment relationship ending.

[68] I do not conclude a breach about the failure to provide a safe workplace.

Abandonment

[69] Ms Wylie had asked E to see if Ms Hurrell would come back in on 26 August 2022 and cover front of house because another employee had gone off sick. E likely miscommunicated the situation and sent a text that Ms Hurrell had two days to come back to work or she would be considered to have abandoned her employment.

[70] Ms Hurrell sent a text to Ms Wylie about this on 26 August 2022 and Ms Wylie responded and said, "I will talk soon" and stated that the message had not been relayed quite correctly.

[71] The miscommunication was resolved very quickly, and the abandonment clause not relied on. Ms Hurrell resigned.

[72] I do not conclude a breach in that respect.

Delay in provision of footage

[73] There was a delay in the provision of the camera footage of the incident however I do not conclude it amounted to a breach of duty in the circumstances.

Ms Hurrell classified as the ringleader/disagreement between adult comment/running away

[74] Ms Wylie had a view that Ms Hurrell distributed an article about X. Ms Hurrell did not accept that. People are entitled to have different views about things. Nothing occurred as a result of that difference. Ms Wylie may well have had a view about the camera footage from

the 26 August 2022 incident. Ms Hurrell was able to put forward her perspective about the incident on 26 August 2022 through Mr Mathews.

[75] The comment about the incident on 26 August being a disagreement between adults upset Ms Hurrell because she considered it minimised the incident. Likewise the comment about running away. I acknowledge how they may have been upsetting but do not conclude such comments crossed the line to be repudiatory in nature.

[76] There is no breach as a result of the above.

Other staff impacted

[77] I accept that X had an impact on the work environment in various ways. The concerns were known about and attempts made to address matters as they arose. Ultimately the employment relationship with X ended but not following the incident on 26 August. The focus for the Authority is however on Ms Hurrell's claim.

Conclusions

[78] Ms Hurrell felt that she could not work any further with X and she resigned for a second time. The first time she did not attribute her resignation to breaches on the part of Menopaws but she did the second. It is unacceptable behaviour for one employee to swear at another employee in an aggressive manner. Ms Hurrell was understandably upset. On an objective assessment however I have not been satisfied that the resignation was because Menopaws breached its obligations to Ms Hurrell individually or cumulatively.

[79] Given this conclusion I do not find that Ms Hurrell's resignation was in fact a dismissal.

[80] The unjustified disadvantage claims are based on the same alleged actions/omissions, and I am not satisfied that those claims are made out either.

[81] Unfortunately, there is nothing further I can do for Ms Hurrell.

Costs

[82] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[83] If they are not able to do so and an Authority determination on costs is needed Mr Brown may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Mathews will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[84] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴

Helen Doyle
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1